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No. 88-1039

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM FRENCH SMITH, ET AL., PETITIONERS

v.

ANTHONY J. PRISCO, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM REGARDING MOOTNESS

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Pursuant to the Court's request, petitioners submit the following memorandum on the question of mootness.

1. The court of appeals held that petitioners Meese and Morris could not appeal from an order denying their claim of qualified immunity because these petitioners were also being sued for injunctive and declaratory relief in their official capacity. Since the court of appeals issued its decision, Mr. Meese has ceased to be Attorney General and therefore is no longer subject to suit in his official capacity. The basis for the court of appeals' jurisdictional ruling with respect to Mr. Meese has thus ceased to exist, and the issue raised by that ruling is, in our view, moot.

In such circumstances, this Court might ordinarily vacate the ruling below and remand to the court of appeals so that petitioner Meese's appeal could be heard on the

merits. In the present case, however, that course would serve no purpose, because in its analysis of petitioner Smith's qualified immunity defense, the court of appeals has already reviewed and rejected the bases of petitioner Meese's qualified immunity claim. The court of appeals has announced its view that respondent has alleged a violation of a clearly established constitutional right, and has held that it will not consider the legal sufficiency of respondent's pleadings. Thus, in the event of a remand, the court would almost certainly affirm the denial of petitioner's Meese's claim of immunity for the same reasons it offered with regard to petitioner Smith.

Accordingly, although the first, jurisdictional question raised by our petition has become moot with respect to petitioner Meese, a remand at this stage would be inappropriate. The issues raised by the second question of our petition with respect to petitioner Smith are also live for petitioner Meese, and those issues independently merit review by this Court.

2. The first, jurisdictional question remains live with respect to petitioner Morris, who continues to serve as the Director of the Marshals Service. In our petition to this Court, we argued that the court of appeals' jurisdictional ruling was in error for two reasons. First, that court's ruling lacked any basis in this Court's teachings and was contrary to the ruling of every other circuit court to consider the question. Pet. 9-13. Second, respondent's prayer for injunctive and declaratory relief had become moot when Lauren Prisco left the Witness Protection Program before the court of appeals considered this case.[1] Pet. 13 n.14.

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[1] Count I of respondent's complaint stated the following request for declaratory and injunctive relief (C.A. App. 17a-18a):

> a. For Declaratory Judgment that the conduct of the defendants herein violated the constitutional rights of plaintiff Anthony

Because Lauren is no longer in the program and the state court custody proceedings referred to in the complaint have now been completed, there remained no further prospective relief for the court to grant. Although the court of appeals was aware of those facts, it made no reference to

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J. Prisco, Jr. and Lauren Prisco as contained in U.S.C.A. Constitution Amendments 5 & 14 and therefore is impermissible conduct under the circumstances;

b. For an Injunction to issue against all defendants herein and all agents, servants or employees of defendants herein from in any way concealing or refusing to disclose to plaintiff any information to plaintiff with regard to the whereabouts of his daughter Lauren Prisco and further enjoining the defendants herein and their agents servants and employees from in any way interfering with the normal contact between plaintiff and his daughter Lauren Prisco;

c. Directing defendants herein and anyone acting under their control to immediately disclose to plaintiff, Anthony J. Prisco, any and all information about his daughter Lauren Prisco including but not limited to the following:

1) her name;
2) her address;
3) her telephone number
4) her school address and phone number

d. For an injunction directed to defendants herein their agents, servants and employees enjoining them from in any way restricting, limiting controlling or being involved in visitation between plaintiff and Lauren Prisco;

e. Directing the defendants herein and their agents servants and employees to immediately turn over custody of Lauren Prisco to plaintiff, Anthony J. Prisco;

f. For an Injunction preventing and enjoining defendants herein their agents, servants and employees including the United States Attorney from participating in any way in the matter of Prisco v. Prisco which is currently pending in the Court of Common Pleas of Philadelphia County, Pennsylvania;

g. For such other relief as the Court may deem just and proper under the circumstances.

them in ruling that petitioners Meese and Morris would be required to stand trial in their official capacity in respondent's suit for prospective relief.[2]

If the first, jurisdictional question were the only issue before the Court, the errors in the ruling below might constitute grounds for summary reversal with respect to petitioner Morris. But as with petitioner Meese, a remand to the court of appeals at this stage would serve no purpose in light of the court's earlier ruling with regard to petitioner Smith.

3. In sum, the Court should grant the petition. The questions of the court of appeals' jurisdiction over the appeals of petitioners Meese and Morris may not require plenary review, for the reasons stated herein, but the Court should defer any remand with respect to their appeals until it has resolved the second question in the petition with respect to petitioner Smith.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

MAY 1989

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[2] We informed the court of appeals in our opening brief (at 4) that Lauren had left the Witness Protection Program, and we argued in our petition for rehearing and suggestion for rehearing en banc (at 8 n.3) that this fact had rendered moot respondent's prayer for injunctive relief.

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